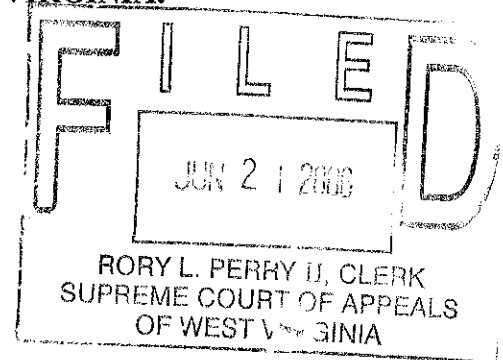


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:**

Case No. 33086



**IN RE: THE INTEREST OF  
RANDY H., APRIL G., BRITTANY T. and MEGAN H.**

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**BRIEF IN SUPPORT OF PETITION  
FOR APPEAL  
BY COUNSEL FOR THE CHILDREN**

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Submitted by:

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## **TABLE OF AUTHORITIES**

### **West Virginia Supreme Court of Appeals Cases**

<u>In re: Erica C., Ashley J. and Oakie Lee C.,</u>	214 W.VA. 375, 589 S.E.2d 517 (2003).....
<u>In re: Emily,</u>	208 W.Va. 325, 540 S.E.2d 542 (2000).....
<u>In the matter of George Glenn B., Jr.,</u>	205 W.Va 435, 518 S.E.2d 863.....
<u>In the interest of Jamie Nicole H.,</u>	517 S.E.2d 41 (W.Va. 1999), Syl Pt. 1.....
<u>In the matter of Taylor B.,</u>	201 W.Va. 60, 491 S.E.2d 607 (1997).....
<u>In the interest of Tiffany Marie S.,</u>	196 W.Va. 223, 470 S.E.2d 177 (1996), Syl. Pt.
<u>West Virginia Department of Health and Human Resources v. Doris S.,</u>	197 W.Va. 489, 475 S.E.2d 865 (1996) .....
<u>In re: William John R.,</u>	200 W.Va. 627, 490 S.E.2d 714 (1997, Syl. Pt. 1.....

### **West Virginia Constitutional Provisions, Statutes, and Rules**

West Virginia Code 49-6-1 to 12 (1998).....
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## **PROCEDURAL HISTORY**

On 29 July 2005, a petition was filed seeking custody of the referenced children.

On 2 August 2005, the matter came on for a preliminary hearing. The West Virginia Department of Health and Human Resources moved to dismiss the petition due to their inability to secure witnesses from University of Virginia Hospital, and to return the children to the caretakers with services provided. (Transcript dated 2 August 2005, page \_\_\_\_\_)

The guardians for the children objected to the dismissal of the petition given the availability of other witnesses and given the nature of the allegations. (Transcript dated 2 August 2005, page \_\_\_\_\_)

Accordingly, the Court declined to dismiss the petition, but did return the children to the custody of the caretakers and scheduled the matter for further preliminary hearing on 8 September 2005. Upon motion by the guardians, the Court prohibited contact between the children and one Kevin Phillips, a registered sex offender and the individual who was watching the children when the incident referred to in the petition occurred. (Transcript dated 2 August 2005, page \_\_\_\_\_)

On 8 September 2005, the matter again came on for preliminary hearing, at which time it was announced by the West Virginia DHHR that witness testimony could not be procured, telephonically, from UVA. (Transcript dated 8 September 2005, page \_\_\_\_\_)

\_\_\_\_\_)

Additionally, issues regarding aggravated circumstances were being reviewed, and it was announced by the Respondent Lucinda H. that presiding Judge Donald H. Cookman may have represented the WVDHHR in prior proceedings against her, and moved to disqualify Judge Cookman in that event. The Department again moved to dismiss the petition given compliance with services. The guardians again opposed said motion to dismiss given the allegations of aggravated circumstances, the extensive Departmental history with the family, and the number of registered sex offenders that had contact with the children. (Transcript dated \_\_\_\_\_, page \_\_\_\_\_) Accordingly, the Court ordered that prior records regarding Lucinda H. be made available to all counsel and that specific note be made of the Department's prior representation – possibly by Judge Cookman when he was a prosecutor. The Court denied the motion to dismiss the petition and set the matter for motion to disqualify and/or preliminary hearing on 19 September 2005.

On 19 September 2005, the matter came on for consideration of the motion for disqualification, and it was noted that Judge Cookman did, in fact, previously serve as prosecuting attorney in an abuse and neglect proceeding involving Lucinda H., and Judge Cookman thereupon did file his letter of voluntary recusal with the West Virginia Supreme Court of Appeals. On the same date, the WVDHHR filed an amended petition alleging aggravated circumstances.

The Honourable Judge Andrew N. Frye, chief judge of the 21<sup>st</sup> Judicial Circuit, was

subsequently appointed to preside in the matter.

On 23 September 2005, the matter came on for preliminary hearing before Judge Frye. The WVDHHR moved to dismiss the allegations in the petition with the exception of aggravated circumstances, which was so granted. (Transcript dated 23 September 2005, page \_\_\_\_\_) Counsel for the children objected to the motion to dismiss. The Court proceeded to preliminary hearing, and set the matter for status hearing on 3 November 2005.

On 3 November 2005, all parties and counsel appeared for a status hearing, at which time, the Respondent Lucinda H moved to dismiss the matter, to which counsel for the children objected. (Transcript dated 3 November 2005, page \_\_\_\_\_) Upon consideration of same, the Court dismissed the matter.

Although dated November 2005, the Order was entered on 20 December 2005, and it is this Order from which an appeal is taken.

## **STATEMENT OF FACTS**

The four (4) children that are the subject of these proceedings are Randy, now aged 2, April, now aged 5, Brittany, now aged 9 and Megan, now aged 16. The family has been well known to the Department since at least the 1980s. Numerous referrals during that

period of time involved parenting issues and failure to provide a safe and healthy environment for the children.

On 28 July 2005, the DHHR filed a petition alleging that 8 year old Brittany took 4 year old April and 2 year old Randy into a bathroom, locked the door and gave the prescription drug Clonidine to the two younger children. Kevin Phillips, a registered sex offender, was caring for the children at the time and phoned 911, resulting in admissions to Grant Memorial Hospital and a transfer to University of Virginia in Charlottesville. The DHHR took emergency custody of the children in the hospital, and custody of Megan and Brittany was obtained after much chaos and an attempt to secret the children by Lucinda H. At the time of discharge from UVA, Randy was also treated for lice infestation and it was noted that April had bruising on inner thigh, a yeast infection and was "not guarded of her private area" during examination. According to reports, on 30 August, April revealed sexual abuse to supervised psychologist Mary Connley.

After reviewing disclosure in this matter, it would appear that the DHHR became involved with this family in the early 1980s, ultimately resulting in the termination of Lucinda H.'s (aka Linda C.) rights to 6 children, four voluntary terminations and two involuntary. From the institution of the FACTS system used by the DHHR to track referrals, from 1997 to the date of the instant referral, the petition alleges that 27 referrals were made on this family, and the 28<sup>th</sup> premised the petition for emergency custody.

Seven parents are involved with these children, plus one caretaker, Kevin Phillips. Megan, now aged 16, is the daughter of Lucinda H and Calvin H . Megan has alleged that her father Calvin H , a registered sex offender, got her drunk, and she awoke with her clothes off. Also, uncle Eddie H was in bed with her and rubbed up against her. This was referred to the State Police, but Lucinda "didn't like the cops' attitude", and there was no follow up with the prosecution of the case. Allegedly, Megan and Kevin Phillips, a registered sex offender, were dating at the time of the filing of the petition.

Brittany and April are the children of Rhonda Gray T and Charles T and James G respectively. Rhonda signed over legal custody of Brittany and April to Lucinda H because Lucinda threatened to turn Rhonda over to the welfare. Rhonda is currently reconciling with her fifth husband, James G , a sex offender, not registered..

The baby in the household is Randy, aged 2 years, who is the child of Lucinda's daughter, Mary Ann C , and Lucinda's husband, Simon H . As a result of this union, Simon H was prosecuted and accepted an information and subsequently plead in October 2004 to lewd and lascivious behavior with Mary Ann.

Simon and Lucinda are the heads of this blended household, with no visible means of support save social services.

Reference is hereby specifically made to the following conclusions made in the psychological evaluation of Lucinda H the children's primary custodian:

"In reality, she has put her children at risk for abuse by the ongoing contact with a number of named sexual offenders and describes much conflict within the household with various family members and those that she takes in. Her parental rights were terminated to her own children, yet she now has legal custody of three very small children, one of which is her daughter's child by her husband. Again, she appears to have the verbal information regarding family boundaries and relationships, yet has not been able to achieve healthy boundaries, relationships or structure within her home."

Further, in that same evaluation:

"There also appears to be the risk for intergenerational sexual victimization. Lucinda blames her daughter for tempting her husband into a sexual relationship and appears to give little responsibility of self-control to her husband. This denial/minimization of responsible sexual behavior may put the children that she has legal custody of or that she supervised at risk."

From the testimony of Leslie See, the Family Preservation Services Counselor, it was evident that the service provider was never advised by the Department of Health and Human Resources that protection of the children from sexual abuse was a necessary part of the program for treatment. (Hearing transcript, date, page \_\_\_\_\_).

The guardians ad litem repeatedly opposed return of custody and/or dismissal of the petition inasmuch as aggravated circumstances were present, the family had an extensive history with the department, and the children were repeatedly exposed to various and sundry registered sex offenders.<sup>1</sup>

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<sup>1</sup> The children were scheduled for sexual abuse evaluations at the Freemou Clinic on 16 November 2005. After numerous delays and continuances by Lucinda, the report is allegedly completed but not yet received by the DHHR. Oral reports indicated that the children were "coached". (Telephone confirmation to guardians from caseworker, 16 June 2006).

## STANDARD OF REVIEW

When the findings of fact and conclusions of law are challenged and appealed in an abuse and neglect proceeding, the Supreme Court shall utilize a two-prong deferential standard of review. The final Order and the disposition is reviewed under an abuse of discretion standard, and then this Court shall review the Circuit Court's underlying factual findings under a clearly erroneous standard. *In re: William John R.* 200 W. Va. 627, 490 S. E. 2d 714 (1997), Syl. Pt. 1; *In re Emily*, 208 W. Va. 325, 540 S. E. 2d 542 (2000).

“ Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing Court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” *In the interest of Jamie Nicole H.* 517 S. E. 2d 41 (W. Va. 1999), Syl Pt. 1; *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S. E. 2d 177 (1996), Syl. Pt. 1.

## ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to ensure that remedial measures were made by a custodian who had a prior extensive history of neglect and failure to protect, resulting in the termination of the custodian's rights to six (6) biological children.
2. The Circuit Court erred in summarily dismissing the Petition where there was substantial evidence of on-going neglect and failure to protect by a custodian of the four (4) minor children now in her custody.

## DISCUSSION OF ASSIGNMENTS OF ERROR

### A. Aggravated circumstances

As this Court held *In the matter of George Glen B., Jr.*, 205 W.VA. 435, 518 S.E.2d 863.

Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at a minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code 49-6-1 to 12 (1998).

Under the circumstances, the Respondent Lucinda H. had a right and affirmative duty to present evidence to show that since the termination of Lucinda's six children, that remedial efforts have been made to address the issues that predicated the removal and termination of those children. No change of circumstances has been shown. No therapeutic interventions or parenting classes were sought. Most notably, there has not been a change of attitude. Sex offenders and offenses permeate this family, but Lucinda says that a person needs to be granted "a second chance". Illustrative, Lucinda, during the period of time in which Charles T. was incarcerated, forwarded a photograph of Brittney posed in front of a sexually explicit homemade poster referring to Simon H.'s male genitalia and sexual prowess, a copy of which is attached hereto.

Sadly, there has been no improvement or change of parenting attitudes in the decades that Lucinda has been known to the Department.

The Circuit Court at the 3 November 2005 hearing, summarily dismissed the matter without ensuring that the circumstances which lead to the removal of the Respondent, Lucinda H.'s six older children, that primarily being a failure to protect, were not a current threat, especially in light of the fact that numerous sexual offenders had access to the children on a regular basis.

#### B. Current allegations

Relative to the current failure to protect allegations, in the case plan proposed by DHHR prior to dismissal of the action by the Court failed to prohibit the inclusion of Simon

H , custodian, and father of his wife's grandchild, in the home. In fact the Department joined in the dismissal of the petition when the guardians refused to sign the case plan.

The guardians continuously and strenuously lodged objection to his presence in home as being a real threat especially to the safety of the teenage daughter, since Lucinda claimed at the MDT on 28 October 2005, that "a man cannot control themselves if a woman lies in bed".

Yet, the DHHR did initially acknowledge some concern about Simon in the home.

Reference is hereby made to MDT Minutes of 5 October 2005, wherein it was recorded that:

The MDT group reviewed the case plan. The group could not agree on the case plan, primarily Simon's role in the family unit. The GALs would like Simon to be out of the home. Mr. Judy states that there are no allegations against Simon at this time. The GALs stated that Simon had been sexually inappropriate with Mary Ann, and this causes concerns for the other females in the home. The Department had requested for Simon to not be left alone with the children. Ms. Redman (DHHR caseworker) did state to the MDT group that she did have concerns about Simon being left alone with the children due to his relationship with Mary Ann, and that she could not guarantee safety. (MDT minutes, 5 October 2005).

As in all abuse and neglect cases, the core issue of abuse must be admitted. *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S. E. 2d 607 (1997); *West Virginia Department of Health and Human Resources, v. Doris S.* 197 W. Va. 489, 475 S. E. 2d 865 (1996).

Both the Department of Health and Human Resources and the Respondent Parents failed to fully and meaningfully acknowledge any of the presenting problems. At the time the Petition was filed, three children, supervised by registered sex offender Kevin Phillips

locked themselves in the bathroom. The eldest child, then aged 8, forced the two younger children, then aged 4 and 1 ½, to ingest the prescription medication Clonidine. The two younger children ultimately were admitted to the University of Virginia Medical Center in Charlottesville, Virginia after being treated by emergency personnel and at Grant Memorial Hospital in Petersburg, WV. The children were covered with head lice, one child had a yeast infection and pelvic bruising. When Lucinda H., sex-offender Jesse P. and Megan H. arrived at the hospital, their behavior was so hostile and inappropriate that the UVA staff reported it to the West Virginia DHHR. They also reported that 15 year old Megan and registered sex-offender Phillips were obviously a couple.

Yet, at the 2 August 2005 hearing, the Department moved to dismiss due to lack of witnesses, although they knew of aggravated circumstances. At the 23 September 2005 hearing, the DHHR moved to dismiss all allegations with the exception of aggravated circumstances. (Transcript dated 23 September 2005 , page \_\_\_\_\_) Even without aggravated circumstances, the situation warranted a full investigation. Very young children were found in the care of a registered sex offender; very young children were unsupervised to the extent that they were able to lock themselves in the bathroom and take prescription medications; very young children were observed by medical providers as having lice, pelvic bruising and one not guarded of her genital area.

The custodian Lucinda H. evidences a lengthy pattern, essentially all of these children's lives, of failure to recognize the very risk of association with registered sex

offenders. In fact, she seems to cultivate them. Of the various named respondents who have had access to the children in this matter, there is:

- A. Kevin Michael Phillips, caretaker of the children on the date of the subject incident, a registered sex offender since 1991. UVA staff reported he was obviously a couple with Megan.
- B. Calvin H. , father of Megan H., a registered sex offender since 1999. Megan H. has alleged that he supplied her with alcohol and that she awoke with her clothes off, being fondled by an Uncle Eddie.
- C. James G. , father of Brittney T., a sex offender, not registered.
- D. Simon H. , husband of Lucinda, father of Lucinda's daughter's child, Randy H. Simon accepted a plea to lewd and lascivious behavior with his step-child. Simon is the head of the household, and as was testified at the hearing on 26 September 2006, the Department did not advise Family Preservation Services that his presence was not appropriate in the household.

Courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. Syl Pt. 3, *In re: Erica C., Ashley J. and Oakie Lee C.*, 214 W.VA. 375, 589 S.E.2d 517 (2003).

Findings shall not be set aside by a reviewing court unless clearly erroneous and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. Syl Pt. 1, in part, 214 W.VA. 375, 589 S.E.2d 517 (2003). In this case, the evidence was compelling that the children had, in varying degrees, been abused and/or neglected by their custodian, Lucinda H. and her associates. The custodian did not prove, by clear and convincing evidence, any ability or commitment to provide a safe environment for these children, nor did she acknowledge that any exposure to sex offenders placed the children in her care at risk.

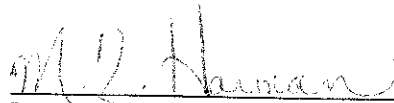
The danger to the minor children in this matter is real and ongoing and the dismissal of the petition, especially in light of the aggravating circumstances warrants this Court's intervention for the future protection of the children. Opportunity for full development of this case should be afforded the children. The time and expenses which may or may not be incurred in protecting these children should not be a factor for consideration by the Court as espoused by counsel for the Respondent parent.

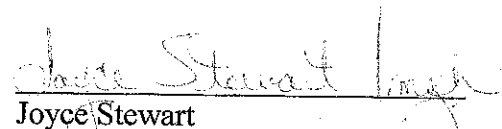
Had the Department put as much effort into services for the family as they did in the removal of the children which was late night with several social workers and the police involved – then the children would not be at risk.

**PRAYER FOR RELIEF**

The undersigned guardians ad litem pray that this Court grant an appeal in this matter and commend the protection of these children to the wisdom of this honourable Court.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I, Marla Zelene Harman, Guardian ad Litem for Randy H., April G. Brittany T. and Megan H., and Joyce Stewart, Guardian ad Litem for April G., do hereby certify that I have on 20 June 2006, served the foregoing Brief, by mailing the original of same, United States Mail postage prepaid, to the Office of the Clerk of the Hardy County Circuit Court, Hardy County Courthouse, Moorefield, West Virginia and to the Clerk of the Supreme Court of Appeals, at their address of State Capitol, Charleston, West Virginia 25305 and to the following counsel of record, to-wit:

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IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA  
THAT BEING THE JUVENILE COURT OF SAID COUNTY

IN RE: RANDY E. H  
APRIL L. G  
BRITTANY T.  
MEGAN H

JUVENILE ACTION NO. 05-JA-11  
05-JA-12  
05-JA-13  
05-JA-14

**DISCLOSURE BY STATE**

Pursuant to the Respondents request for disclosure in this case, the State hereby discloses the attached information.

STATE OF WEST VIRGINIA  
By Its Prosecuting Attorney

LUCAS J. SEE  
Hardy County Prosecuting Attorney

**CERTIFICATE OF SERVICE**

I, Lucas J. See, Hardy County Prosecuting Attorney, do hereby certify that a true copy of the foregoing **Disclosure by State** was served upon the following parties, by hand delivering a true copy thereof, to them at the Hardy County Courthouse, on this 2<sup>nd</sup> day of September, 2005.

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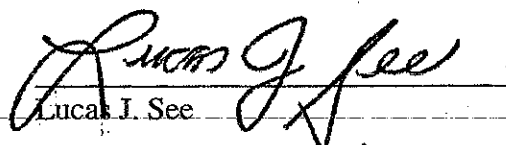
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PETITIONER'S  
EXHIBIT